IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01459-COA

PATRICK O'NEAL SAVONTRELL   APPELLANT
MONTGOMERY, A MINOR, BY AND
THROUGH PATRICK TOWNSEND, FATHER
AND NEXT FRIEND

v.

MISSISSIPPI BAPTIST HEALTH SYSTEMS   APPELLEE

DATE OF JUDGMENT:	07/19/2012
TRIAL JUDGE:	HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JOHN R. REEVES
	JOHN JUSTIN KING
ATTORNEYS FOR APPELLEE:	EUGENE RANDOLPH NAYLOR
	REX MORRIS SHANNON III
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
TRIAL COURT DISPOSITION:	CASE DISMISSED FOR FAILURE TO PROSECUTE
DISPOSITION:	REVERSED AND REMANDED - 04/01/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, C.J., BARNES AND ISHEE, JJ.

BARNES, J., FOR THE COURT:

¶1.   A complaint was filed in Hinds County Circuit Court against Mississippi Baptist

Health Systems (MBHS) on January 5, 2001, alleging negligence in the medical care of

Patrick O'Neal Savontrell Montgomery, a minor.   The injury allegedly occurred on

December 30, 1997. In 2008, an order was entered by the Hinds County Chancery Court,

awarding custody of Montgomery to his natural father, Patrick Townsend, and allowing

Townsend to intervene as a party and represent Montgomery's interests in the circuit court

suit.[1] However, even though MBHS filed a motion to compel discovery on August 27, 2009,

which the circuit court granted, no action of record was taken by Montgomery after 2008,

except for a couple of responses to interrogatories.

¶2.   Finally, on July 17, 2012, the case was called for a status update at a mandatory

docket call on threat of dismissal for failure to prosecute. Since the email address of

Montgomery's counsel was not included in the mass docket notice, counsel did not get the

notice of the hearing and did not attend the docket call. Consequently, on August 8, 2012,

the circuit judge, sua sponte, entered an order of dismissal for failure to prosecute under

Mississippi Rule of Civil Procedure 41(b). The order stated:

> Having noted that there has been no action of record in this matter for over two
> and one-half (2½) years and otherwise being fully advised in the premises, the
> Court finds that pursuant to *Hensarling v. Holly*, 972 So. 2d 716 (Miss. Ct.
> App. 2007), it has authority to dismiss this action based upon Plaintiff's clear
> record of delay in the prosecution of this matter.

This order by the circuit court "operate[d] as an adjudication upon the merits." *See* M.R.C.P.

41(b) (Involuntary dismissal for failure to prosecute is "an adjudication upon the merits"

unless otherwise specified.).

¶3.   Montgomery filed a motion to reconsider on August 10, 2012, arguing that counsel

would have attended the docket call had he received notice. Out of an abundance of caution,

Montgomery then filed a notice of appeal with the Mississippi Supreme Court on September

7, 2012. A hearing on the motion to reconsider was held on September 10, 2012, at which

time the circuit judge learned that Montgomery had filed his notice of appeal. As a result,

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[1] We will refer to the plaintiff/appellant as "Montgomery" throughout the remainder
of this opinion.

the circuit judge concluded, in his November 30, 2012 order, that the filing of the notice of appeal with the supreme court deprived him of jurisdiction over the matter, and he denied Montgomery's motion, finding it "moot." However, the circuit judge did note that had "jurisdiction remained in th[e] court," he would have reinstated the matter.

¶4.   Montgomery appeals, claiming that the circuit court abused its discretion in dismissing the case, and that it should have considered lesser sanctions. Upon review, we find that the circuit court erred in its determination that it did not have jurisdiction to rule on Montgomery's motion to reconsider. Therefore, we reverse the circuit court's judgment and remand for further consideration of the merits of Montgomery's motion.

DISCUSSION

¶5.   Although not raised by either party on appeal, we must discuss the circuit court's finding that it did not have jurisdiction to consider Montgomery's motion. Mississippi Rule of Appellate Procedure 4(d) provides, inter alia, that a timely motion under Mississippi Rule of Civil Procedure 59 to alter or amend a judgment suspends the time for filing a notice of appeal. The rule continues:

> A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding.

The comment to Rule 4 further notes: "A notice filed before the filing of one of the specified motions or after the filing of a motion but before its disposition is, in effect, suspended until the motion's disposition, whereupon the previously filed notice effectively places jurisdiction in the Supreme Court."

¶6.   On September 13, 2012, counsel for Montgomery aptly asserted in a letter to the circuit judge: "We believe it is appropriate to consider the appeal deadline tolled upon the filing of a motion to reconsider[,] and we believe the court should make a ruling on the motion, but we had to file the notice of appeal to be certain in protecting the rights of this child who is the plaintiff." Montgomery timely filed what was, in effect, a motion to reconsider the judgment under Mississippi Rule of Civil Procedure 59(e). As a result, under Rule 4(d), Montgomery's notice of appeal was "suspended" until the circuit court's disposition of his motion to reconsider. Accordingly, we find that the circuit court had jurisdiction to consider the merits of Montgomery's motion. The circuit court stated that if it had jurisdiction, it would reinstate the matter "out of an abundance of caution" and "allow it to proceed to trial" since Montgomery's attorney did not receive notice of the docket call.

¶7.   We reverse the circuit court's judgment and remand this case for further proceedings on the merits of Montgomery's motion for reconsideration.

¶8.   **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.**

    LEE, C.J., IRVING, P.J., ISHEE, ROBERTS, CARLTON, MAXWELL, FAIR AND JAMES, JJ., CONCUR. GRIFFIS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION.

    GRIFFIS, P.J., DISSENTING:

¶9.   The majority reverses the circuit court's judgment and remands this case for further proceedings on Montgomery's motion for reconsideration. I find that Montgomery waived this issue by his failure to raise this issue on appeal. Therefore, I respectfully dissent.

¶10. The circuit court dismissed this case by order dated July 19, 2012; the order was filed on August 8, 2012. On August 10, 2012, Montgomery filed a motion to reconsider or, in the alternative, reinstate the case. On September 7, 2012, Montgomery filed a notice of appeal. On November 30, 2012, the circuit judge entered an order that found Montgomery's motion to reconsider moot and denied the motion. In the order, the circuit judge added that "if jurisdiction remained in this court, out of an abundance of caution, the court would reinstate this matter and allow it to proceed to trial."

¶11. The majority acknowledges that its decision is based on an issue "not raised by either party on appeal." Mississippi Rule of Appellate Procedure 28(a)(3) requires the appellant to "identify the issues presented for review." The Rule also provides that "[n]o issue not distinctly identified shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified." The majority apparently determines that this was plain error.

¶12. I am not willing to do so for two reasons that we often use to decide that a party has waived an issue on appeal. First, Montgomery chose not to raise the issue in this appeal. Second, Montgomery failed to cite any authority for this proposition.

¶13. The judgment before this Court is the November 30, 2012 order. In this order, the circuit court denied the motion to reconsider, finding the court did not have jurisdiction. In the appellant's brief, Montgomery argues the issue as follows:

> 3. The Trial Court Has Indicated That Had it Retained Jurisdiction, it Would Reinstate the Case and Allow the Case to Proceed to Trial.
>
> In its order denying Mr. Townsend's motion to reconsider the court noted that Mr. Townsend's counsel "contends he did not have notice of the docket call .

. . . He states that he would have been at the docket call if he had received the notice . . . . [O]ut of an abundance of caution, the Court would reinstate this matter and allow it to proceed to trial." (Clerk's Paper's pgs. 113-114). It is apparent that the trial court, knowing the reason counsel for Mr. Townsend did not appear at the docket call (counsel having not received notice of the docket call), desires that the case be reinstated and allowed to proceed to trial.

Montgomery did not file a reply brief.

¶14.   This Court often holds that "[i]ssues raised for the first time on appeal are procedurally barred." *McNeese v. McNeese*, 119 So. 3d 264, 267 (¶34) (Miss. 2013). Here, the issue was not even raised on appeal. Montgomery could have raised this issue, but did not. I find it inappropriate for this Court to reverse the circuit court on an issue not even raised by the appellant.

¶15.   Next, this Court also often holds that the "[f]ailure to cite to relevant authority results in a waiver of the issue on appeal." *Bennett v. State*, 933 So. 2d 930, 953 (¶86) (Miss. 2006). In his brief, Montgomery offers no legal authority to support the proposition that is cited. I am of the opinion that it sets dangerous precedent for this Court to reverse a circuit court on a matter that is not raised before this Court and where no legal authority is offered.

¶16.   I find that Montgomery waived this issue by not raising it as an issue on appeal. I would consider the merits of the issues raised by Montgomery. For these reasons, I respectfully dissent.